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IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Brief of Paul Allen Beck, Janet M. Box-Steffensmeier, Leon D. Epstein, Anthony Gierzynski, Donald P. Green, Paul S. Herrnson, Ruth S. Jones, Ira Katznelson, Bruce Larson, David B. Magleby, Thomas E. Mann, David Schultz, Daniel M. Shea, and Frank J. Sorauf as *Amici Curiae* in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*

Amici are political scientists, many of whom have experience in, and all of whom are students of, the political process. *Amici* submit this brief *amicus curiae* in support of Petitioners.[1] *Amici* have dedicated all or a substantial part of their careers to studying, analyzing and discussing the history of and trends in the political system in the United States. As a result, *amici* have considerable knowledge of campaign financing practices and the effects of various practices on the electoral process. *Amici* thus have reasoned opinions on the issues in this case and all share an interest in bringing their views before this Court.

In particular, the *Amici* are: Paul Allen Beck, Professor and Chair (Department of Political Science), Ohio State University, former Program Chair of the American Political Science Association, whose writings include *Party Politics in America* (8th ed. 1997); Janet M. Box-Steffensmeier, Associate Professor, Ohio State University, whose writings include *The Role of War Chests in Campaign Strategy*, Am. J. Pol. Sci. 40 (1996); Leon D. Epstein, Hilldale Professor of Political Science Emeritus, University of Wisconsin-Madison, former President of the American Political Science Association, whose writings include *Political Parties in the American Mold* (1986); Anthony Gierzynski, Associate Professor, University of Vermont, whose writings include, *Money Rules: Financing Elections in America* (2000); Donald P. Green, Professor of Political Science and Director of the Institution for Social and Policy Studies, Yale University, whose writings include *The Dynamics of Campaign Spending*

1. The parties have consented to the submission of this brief. Their letters are being filed with the Clerk of the Court concurrently with the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was not authored in whole or in part by counsel for any of the parties. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae* and their counsel.

in U.S. House Elections, 56 J. Pol. 459 (1994) (co-authored with Jonathan S. Krasno & Jonathan A. Cowden); Paul S. Herrnson, Professor of Government and Politics and Director of the Center for American Politics and Citizenship, University of Maryland, whose writings include *Congressional Elections: Campaigning at Home and In Washington* (3d ed. 2000); Ruth S. Jones, Professor, Arizona State University, whose writings include *A Decade of U.S. State-Level Campaign Finance Reform, in Comparative Political Finance Among the Democracies* 57 (Herbert E. Alexander & Rei Shiratori, eds., 1994); Ira Katznelson, Ruggles Professor of Political Science and History, Columbia University, whose writings include *The Politics of Power: A Critical Introduction to American Government* (rev. 3d ed. 1987); Bruce Larson, Assistant Professor, Fairleigh Dickinson University, whose writings include *The Futile Quest for the Ideal Congressional Campaign Finance System, in American Politics: Core Argument, Current Controversy*, (Peter J. Woolley & Albert R. Papa, eds. 2000); David B. Magleby, Distinguished Professor of Political Science, Brigham Young University, whose writings include *Outside Money: Soft Money and Issue Advocacy in the 1998 Congressional Elections* (2000); Thomas E. Mann, W. Averell Harriman Senior Fellow in American Governance, The Brookings Institution, whose writings include *Campaign Finance Reform: A Sourcebook* (1997) (co-edited with A. Corrado, D. Ortiz, T. Potter and Frank J. Sorauf); David Schultz, Professor, Hamline University, Law Professor, University of Minnesota, whose writings include *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 Texas Rev. of Litig. 86 (1998); Daniel M. Shea, Associate Professor, Allegheny College, whose writings include *Transforming Democracy: Legislative Campaign Committees & Political Parties* (1995); and Frank J. Sorauf, Regents' Professor Emeritus of Political Science, University of Minnesota, former President of the Midwest Political Science Association, whose writings include *Inside Campaign Finance: Myths and Realities* (1992).

Introductory Remarks

We are a diverse group of political scientists who agree with the view expressed by the Court of Appeals that political parties play a vital role in the American system of government. Political parties are integral parts of our nation's political life, and strong political parties are good for America. But we do not support the majority opinion's view below that the current Congressional limits on political party coordinated expenditures are inconsistent with or a hindrance to strong political parties.

As a policy matter, most of us would support a Congressional decision to raise "hard money" limits on candidate and political party contributions in exchange for placing severe limits on or banning "soft money." Regardless of our individual policy views on the question of proper contribution and spending limits, there are two matters upon which we all agree. First, in the current environment, where political parties are awash in large amounts of both hard and soft money, allowing unlimited spending by political parties in coordination with their candidates could, at a minimum, increase the public's perception that the political process is being corrupted in favor of the interests of wealthy donors. Second, the decision concerning whether to end the limits on party coordinated spending is one that is best left to Congress, which may choose to tackle this difficult policy question in the context of more comprehensive campaign finance reform.

The Court of Appeals decision, which comes to opposite conclusions, makes two fundamental errors. The Court appears to have assumed that the current limits on coordinated party expenditures have, in fact, somehow hampered the ability of political parties to be vibrant participants in federal electoral contests. However, the two major political parties and their legislative campaign committees (LCCs) are among the most important players

in our electoral landscape. In addition, the Court incorrectly assumes that political parties dilute the influence of large contributors and act as a cleansing mechanism that removes the taint of possible corruption on the money that flows through the political parties from contributors to candidates and officeholders. In reality, however, the political parties and their LCCs go to great lengths to maintain and build relationships between large donors and party candidates and officeholders. The LCCs in particular are not driven by ideology, but instead are service vehicles intended to enhance the electoral prospects of their members. Large contributions made to and coordinated expenditures made by political parties and LCCs give rise to an appearance of corruption and serve to undermine the other Federal Election Campaign Act ("FECA") contribution limits.

I. The Limits on Coordinated Party Expenditures Have Not Hampered the Ability of Political Parties and Their Legislative Campaign Committees to Be Important Players in Federal Elections.

In *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (*"Colorado Republican I"*), this Court held that political parties are permitted to make unlimited hard money independent expenditures in federal political campaigns. The Colorado Republican Federal Campaign Committee argued, and this Court agreed, that political parties should be no worse off than other advocacy groups and independent spenders, who are permitted to engage in unlimited federal political expenditures as long as those expenditures are not coordinated with individual candidates.[2]

2. As political scientists, we are quite skeptical of the view that there is any significant amount of political party activity that should be deemed to be "independent" of the party's candidate. In reality, the political parties and their candidates work together, as they should, throughout a political campaign. Indeed, as the lawyer (Cont'd)

The question presented in this case, however, goes well beyond the premise of *Colorado Republican I*. In regard to coordinated expenditures and direct contributions, the limits established by Congress under FECA discriminate *in favor* of political parties. The Colorado Republican Federal Campaign Committee and all other similar political party committees are permitted to make contributions and coordinated expenditures well in excess of those permitted for other multi-candidate political committees. Thus, the claim in this case is not that the Colorado Republican Federal Campaign Committee is being discriminated against under FECA, but instead that its privileged position is not privileged enough.

Congress' decision to allow the political parties to have higher coordinated spending limits than all other actors in the political arena is a policy judgment with which most political scientists would agree. But Congress' failure to go all the way, and to provide absolutely unlimited party coordinated spending, is not evidence of Congressional hostility towards political parties. Indeed, there is little evidence to suggest that the coordinated party spending limits adopted by Congress have frustrated the ability of political parties to exercise their First Amendment rights to support their candidates. *See Nixon v. Shrink Missouri Gov't PAC*,

(Cont'd)
representing the Colorado Republicans was quoted in a recent *New York Times* interview, "the state of the law [is] 'bizarre' because 'everyone in the country knows that political parties and their candidates work together all the time.' " Linda Greenhouse, *Court Agrees to Review Restrictions on Spending*, The New York Times, Oct. 11, 2000, at A20. Prior to *Colorado Republican I*, it was generally assumed that party spending was invariably coordinated with candidates. *See* F. Christopher Arterton, *Political Money & Party Strength, in The Future of American Political Parties: The Challenge of Governance* 116 (Joel Fleishman, ed., 1982); Kirk Nahra, *Political Parties & Campaign Finance Laws*, 56 Fordham L. Rev. 53, 97 (1987).

528 U.S. 377, 120 S. Ct. 897, 908-09 (2000) ("[A]s in *Buckley*, '[t]here is no indication . . . that the contribution limitations imposed by the [law] would have any dramatic[ally] adverse effect on the funding of campaigns and political associations,' and thus no showing that 'the limitations prevented the candidates and political committees from amassing the resources necessary for effective advocacy.'") (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)). In reality, political parties are dominant players, second only to the candidates themselves, in federal elections.

In the 1977-78 election cycle, the national, state and local Democratic party committees spent $26.9 million in hard money. *See* FEC Reports on Political Party Activity, <http://www.fec.gov/press/ptyye98.htm>. By 1997-98, the last election cycle for which complete data are currently available, the Democratic Party reported spending $155.3 in hard money, an almost six-fold increase. *See id.* The 1997-98 Democratic party committee spending figures represented an 18 percent increase when compared to the previous mid-term election cycle of 1993-94. *See id.* Similarly, in the 1977-78 election cycle, the Republican party committees spent $85.9 million in hard money. *See id.* By 1997-98, the Republican committees had increased their hard money spending to $275.9 million, which represented a 19 percent increase from 1993-94. *See id.* Of course, soft money fundraising and spending by the national, state and local party committees has exploded even more.[3]

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3. Between January 1, 1999, and October 18, 2000, the three Democratic party committees took in $199.0 million in soft money. *See* FEC, 1999-2000 Non-Federal Accounts of National Party Committees, <http://www.fec.gov/press/demsft00.htm>. During that same period, the three Republican party committees took in $210.7 million in soft money. *See id.*, <http://www.fec.gov/press/repsft00.htm>.

The national, state and local Democratic and Republican party committees are not in danger of having their First Amendment rights to communicate with the public and support their candidates squelched. The $431.2 million in hard money spent by the Democratic and Republican party committees on the 1998 Congressional elections was surpassed only by the $740.4 million spent by the combined 2,100 Congressional candidates themselves. *See* FEC Reports on Congressional Fundraising for 1997-98, <http://fec.gov/press/canye98.htm>. Political action committees spent a total of $169 million on the 1998 Congressional races. *See id.; see also* Stephen Ansolabehere & James M. Snyder, Jr., *Soft Money, Hard Money, Strong Parties*, 100 Colum. L. Rev. 598, 602 (2000) (party money accounts for nearly half of all campaign money raised at the national level).

A recent study of all television political advertising during the 2000 election cycle further demonstrates that political parties have not been hampered from exercising their First Amendment right to support their Congressional candidates. Between June 1, 2000, and Election Day, the political parties spent approximately $39.5 million on television ads supporting or opposing candidates in House races. *See* Buyingtime.org: An Interactive Database of Political Ads (Brennan Center), <http://www.buyingtime.org>. In those same races, the candidates themselves spent approximately $75.1 million on their own ads, and other interest groups spent approximately $29.8 million on ads. *See id.* Thus, it is clear that parties were in no danger of being marginalized in House races in 2000.

Party committees similarly outspent all other groups (except candidates themselves) on television advertising in competitive Senate races. In the closely contested Senate races in Michigan, New York and Virginia, where candidates spent approximately $100.2 million on television ads, the parties spent approximately $36.3 million on ads supporting

or opposing particular candidates between June 1, 2000, and Election Day. *See id.* Interest groups spent dramatically less than the parties, just slightly more than $10 million on those same races over the same period of time. *See id.* In sum, parties are not in danger of being unable to match the power of independent groups or unable to exercise their First Amendment right to support their candidates under current law. Wholly apart from their "on the ground" strength in get-out-the-vote activities and direct mail, parties vastly outspent groups on television advertising.[4]

Thus, it is not at all clear that the Colorado Republican Federal Campaign Committee has identified any significant burden on its First Amendment rights. Unlike the situation addressed by this Court in *Colorado Republican I* involving independent expenditures, the political parties are not currently disadvantaged *vis-à-vis* the other relevant political actors. The political parties have been given preferred status in the area of coordinated spending. The coordinated spending limits enacted by Congress have not in fact limited political parties from being robust, vital, and privileged actors in federal elections. In sum, the coordinated party expenditure limits adopted by Congress are not inconsistent with strong political parties, and the question of the appropriate level of coordinated party spending, like the question of setting an appropriate direct contribution limit,[5] is a policy judgment

4. The 1998 federal election cycle saw similar results. A total of $177 million was spent in 1998 on television advertising by all political actors, of which 79 percent was spent by candidates, 15 percent was spent by parties, and 6 percent was spent by interest groups. J. Krasno & D. Seltz, *Buying Time: Television Advertising in the 1998 Congressional Elections* (Brennan Center 2000) at 34 (Table 2.3). The parties spent $25.7 million on coordinated ads and "issue ads" that supported or opposed particular federal candidates. *See id.* Outside groups spent $10.8 million on independent expenditures and issue ads. *See id.*

5. FECA quite properly treats spending coordinated with a candidate as a contribution to the candidate. *See* 2 U.S.C. (Cont'd)

that is best left to Congress. *See Shrink Missouri*, 120 S. Ct. at 913 (Breyer, J., concurring) ("[T]he legislature understands the problem — the threat to electoral integrity, the need for democratization — better than do we."); *FEC v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.").

II. Removing the Limits Devised by Congress on Coordinated Party Expenditures Would Undermine the Integrity of Other Contribution Limits and Further Restrict Congress' Ability to Promulgate a Reasonable Campaign Finance Regime.

The Federal Election Commission noted three ways in which allowing unlimited spending by political parties in coordination with their candidates would contribute to the corruption and appearance of corruption against which FECA attempts to guard. First, the FEC asserted that the coordinated spending limits serve to prevent the evasion of the individual spending limits. Second, the FEC pointed to the corruption of the political process that results when large contributors gain influence over the political parties. Third, the FEC noted that individual political party officials can exercise their control over coordinated party spending to their own advantage. Although the Court of Appeals dismissed each of these asserted interests, each has significant factual and logical support.

A. Unlimited Political Party Coordinated Spending Could Lead to Greater Evasion of Other FECA Contribution Limits.

The FEC argued that unlimited political party coordinated spending could contribute to evasion of the other

(Cont'd)
§ 441a(a)(7)(B)(i); *FEC v. National Conser. Political Action Comm.*, 470 U.S. 480, 492 (1985).

FECA contribution limits. Current political party fundraising practices, most notably use of the tally system and joint fundraising committees, which are described below, have already led to some evasion of the individual and PAC contribution limits. However, eliminating the coordinated party expenditure limit altogether would increase this type of evasion. Indeed, eliminating the coordinated party expenditure limit would result in the virtual repeal of the existing $1,000 limit on individual contributions to candidates.

It is certainly true, as the Colorado Republican Federal Campaign Committee asserts, that *some* of the "cleanest" money in federal elections comes through the political parties. The political parties have a large base of donors who regularly contribute small sums of money — $25, $50 or $100 contributions — for solely ideological purposes and with no expectation of any reward. The parties can aggregate these small sums of money and use them for coordinated expenditures throughout the country. The contribution limits in place on hard money under the FECA have partially transformed the parties' historic dependence on large contributors to the present development of a mass bass of small contributors. *See* Leon Epstein, *Political Parties in the American Mold* 276-78 (1986).

However, both political parties continue to obtain a substantial portion of their total contributions from large donations. In 1996, 86 percent of the hard money contributions from individuals in excess of $200 to the DNC consisted of gifts of $1,000 or more. Robert Biersack & Melanie Haskell, *Spitting on the Umpire: Political Parties, the Federal Election Campaign Act, and the 1996 Campaigns, in Financing the 1996 Elections*, 155, 160 (John C. Green ed. 1999). The figure for the RNC was 52 percent of similar contributions. *See id.* Although some individuals contribute large sums to political parties for purely ideological and disinterested reasons, many of these

individuals, especially those who "max out" on their contribution limits, contribute for the access that their money provides.[6] (Hickmott Decl. ¶ 46; Wirth Decl. ¶¶ 14-16). Indeed, the political parties structure their donor programs in a way that emphasizes the different levels of access that donors will receive, based on the level of their contributions. For example, the DNC provided membership in its Business Roundtable for $5,000 hard money contributors, to the Leadership Circle for $15,000 hard money donors, and the Majority Trust for $20,000 hard money contributors. (Hickmott Decl. ¶ 34; *see also id.* ¶ 39 ("The larger the contribution, the smaller and more exclusive the group of people who attended the get togethers with the Senators.")). The Republican Party has similar graduated donor programs.[7]

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6. According to a survey funded by the Joyce Foundation, more than 60 percent of the individuals who contributed at least $200 to a House candidate in 1996 had contact with at least one House member and over 50 percent had contact with two or more. Almost 80 percent of those who contributed at least $200 to a Senate candidate had contact with at least one senator and over 50 percent had contact with two or more. *See* John C. Green, Paul S. Hernson, Lynda Powell, Clyde Wilcox, *Individual Congressional Campaign Contributors: Wealthy, Conservative, and Reform-Minded* (Joyce Foundation 1998). Ordinary voters do not have this level of access to members of Congress.

7. The record below contained evidence that membership in "the House Council," was available to individuals and PACs who contributed $5,000 annually and corporations who contributed $10,000 annually to the Republican Party. Benefits for House Council members included "[r]egular briefings with key Republican Members and staff who work directly on the discussion topic." Membership in "the Congressional Forum" was available to individuals and PACs who contributed $15,000 annually, and for corporations that contributed $20,000 annually. Benefits of membership in the Congressional Forum included "[m]onthly private dinners with the Chairmen and Republican Members of key Congressional Committees" and a "[p]rivate dinner with Speaker Newt Gingrich and the GOP House leadership."

The potential for corruption and evasion of the otherwise applicable FECA contribution limits arises from the fact that political parties and the LCCs rely on their candidates, often incumbent officeholders, to raise their large dollar contributions. (Hickmott Decl. ¶ 34). The candidates do not raise this money for their parties and the LCCs for solely altruistic reasons; rather, they raise this money with an expectation that the parties will spend the money to advance the candidates' own individual electoral success. (Wirth Decl. ¶¶ 5, 8). At least one of the Senate party committees, the Democratic Senatorial Campaign Committee ("DSCC"), has long utilized a system in which the money raised by candidates and incumbent office-holders is tallied to the account of the fundraiser for purposes of determining how the committee's coordinated expenditures will be made. (Hickmott Decl. ¶ 6).

In an attempt to avoid the "earmarking" provisions of the law, the DSCC does not give its candidates a firm assurance that the funds they raise will necessarily be spent on their individual races. But in practice, money is raised by candidates with the expectation that, unless their race is an uncompetitive one, the money they raise will be available to them when they need it.[8] (Hickmott Decl ¶¶ 8, 13, 19, 22). In apparent approval of the tally system, the FEC in 1995

8. Former Senator Paul Simon described the tally system as follows:

> If this were a DSCC event, the money raised would be credited to Senate candidates based on the DSCC's tally system. Donors would be told the money they contributed could be credited to any Senate candidate. The callers would make clear that this was not a direct contribution, but it was fairly close to direct. So contributors would have the sense that this would benefit my campaign, if they contributed to the party.

Mariani v. United States, 80 F. Supp. 2d 352, 390 (M.D. Pa. 1999), *certified question answered by*, 212 F.3d 761 (3d Cir. 2000) (en banc).

entered into a conciliation agreement with the DSCC, which required the DSCC and its candidates to be a bit less explicit with donors about the link between contributions raised by candidates and spending by the DSCC. *See In re Democratic Senatorial Campaign Committee*, FEC Matter Under Review 3620 (Aug. 16, 1995).

The latest wrinkle on the tally system, which came into widespread use in the 2000 election cycle, is the joint fundraising committee. A joint fundraising committee is a vehicle under which two political committees act together to create a new political committee to act as their fundraising representative. In virtually all of the close Senate races this year, the candidates from one or both of the two major political parties created joint fundraising committees with their respective political parties.[9] The joint fundraising committees were established with allocation agreements that were typically structured so that all contributions from individuals would first go into the hard money account of the candidate's principal campaign committee, then into the LCC's hard money account, and finally into the party's soft money account once a donor is "maxed out" on hard money contributions. These joint fundraising committees are the most explicit vehicles existing today for evading FECA's otherwise applicable hard money contribution limits.[10]

9. For example, in Pennsylvania, Rick Santorum set up the "Santorum Victory Committee," while Ron Klink established "Pennsylvania Senate 2000." In Missouri, John Ashcroft set up the "Ashcroft Victory Committee," while the late Mel Carnahan established "Missouri 2000." In Florida, Bill McCollum set up the "McCollum Victory Committee," while Bill Nelson established "Florida 2000." These were all joint fundraising committees that were in addition to the candidates' principal campaign committees.

10. Although there would appear to be a significant argument that these joint fundraising committees are, on their face, a violation of FECA's earmarking prohibitions, to date there have been no publicly-disclosed enforcement actions taken by the FEC against (Cont'd)

For example, the "New York Senate 2000 Committee" was a joint fundraising committee authorized by the DSCC and the Hillary Rodham Clinton for U.S. Senate Exploratory Committee. The New York Senate 2000 Committee solicited contributions of unlimited size from individuals and PACs. Individuals were informed that the first $2,000 of their contribution would be credited to the candidate's principal campaign committee, representing the maximum $1,000 hard money contribution for the primary plus the maximum $1,000 for the general election. The next $20,000 would go to the Democratic Senatorial Campaign Committee's hard money account, and would be "tallied to Hillary Rodham Clinton." Amounts in excess of $22,000 were allocated to the DSCC's soft money account and "credited to the State of New York." Although the solicitation form, in compliance with FEC guidelines, contained a disclaimer stating that "[t]he DSCC does not accept contributions earmarked for a particular candidate," and that "[c]ontributions tallied for a particular candidate will be spent for DSCC activities and programs as the committee determines within its sole discretion," one suspects that contributors to the New York Senate 2000 Committee expected their contributions to be used to assist Hillary Rodham Clinton in her Senate campaign.[11] Thus, an individual donor who wanted to contribute $50,000 to support Hillary Rodham Clinton's election to the Senate could write a single check to the New York Senate 2000 Committee and that amount would be credited to her campaign committee and tallied in the DSCC's records to Hillary Rodham Clinton's account and the committee's New York State

(Cont'd)
any of these committees. We report these developments to the Court not because we believe them to be legal, but instead because we know them to exist.

11. The disclaimer language was required by the FEC under the terms of the conciliation agreement reached with the DSCC in 1995. *See In re Democratic Senatorial Campaign Committee*, FEC Matter Under Review 3620 (Aug. 16, 1995).

account.[12] *See* Invitation from "New York Senate 2000" committee to fundraiser for Hillary Clinton on Nov. 5, 1999, in Beverly Hills, CA (on file at Brennan Center).

It is clear that the spirit, if not the letter, of FECA's $1,000 contribution limit from individuals to candidates is being violated by the tally system and these joint fundraising committees. *See* Sergio Bustos, *Legal Questions Abound in Campaign Soft Money Controversy,* Gannett News Service, Apr. 7, 2000, *available at* 2000 WL 4397348. Under present law, however, there is at least some limit to this evasion. Since the party committees have a coordinated spending limit for each contest, an individual candidate's primary interest is in raising enough money for the party to "guarantee" that it will spend its full allocation in the candidate's own race. (Billings Decl. ¶¶ 7, 10). Once the candidate has ensured that he has raised his quota for the Party, his incentive to continue raising additional hard money in evasion of the $1,000 contribution limits is greatly diminished. If all coordinated expenditure limits were removed, however, one would naturally expect candidates to attempt to raise even larger amounts of money from their "maxed out" donors. The current coordinated spending limits are at least a partial bulwark against this type of evasion of the FECA contribution limits.

Just last term, this Court affirmed the constitutionality of individual contribution limits in the range of FECA's $1,000 cap. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 120 S. Ct. 897 (2000). Despite the fact that Congress has the power to set contribution limits at this level, it may well determine that higher individual contribution limits, coupled with the elimination of soft money, is the best compromise for reducing corruption and the appearance of corruption in federal elections. However, eliminating the

12. As previously noted, there is nothing unique about the above-described joint fundraising committee, as similar ones were utilized by most of the Senate candidates in close races this year.

political party coordinated spending limits now would result in a *de facto* elimination of contribution limits from party committees to candidates and, in turn, place a premium on the value of contributions from individuals and organizations to party committees. With unlimited party coordinated spending, private donors could evade the strict limits on contributions to candidates from individuals and organizations by routing their money through the party committees. Not only does this mean that in the case of individuals, for example, the $1,000 limit on hard money contributions to a federal candidate would be raised twenty-fold, but the party could amass these contributions from any number of individuals and distribute these funds *in toto* to specific candidates, with no reasonable limits. Under this scenario, large party donors need not be indirect contributors — that is, giving money to party committees for the purpose of touting general party ideology through party-building and voter-mobilizing activities. Rather, large party donors could routinely see the sum of their hard-money donations going into the coffers of individual candidates and officeholders. It is precisely this danger — the danger of eroding the integrity of FECA's contribution limits — that led this Court to uphold the limits on donations from corporations and unions to their PACs. *See California Medical Assn. v. FEC*, 453 U.S. 180, 199 (1981) (plurality opinion) (noting that challenged provision "is an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*.").

Congress did not intend to enact a series of contribution limits that could be so easily evaded. Certainly the public's perception of corruption in our system for funding federal political campaigns would not benefit from a system that allows for such wholesale evasion of the currently-existing $1,000 contribution limits. In order to command public respect, the campaign finance system must have a set of

contribution limits that are enforceable, not a set of limits that are designed to be evaded.

While earmarking contributions to party committees for specific candidates is prohibited by law, the close and personal relationships between large donors, party officials and select government leaders frequently leaves little doubt as to the sources and intended beneficiaries of large contributions. With such conspicuous practices as the "tally system" and joint fundraising agreements, any undermining of the coordinated party expenditure limits would further damage public confidence that government is not for sale.

B. Large Donors Can Corrupt Political Parties, and the Court of Appeals Ignores Reality When It Disregards the Existence of Soft Money Abuses and Their Influence on Party Hard Money Spending.

The Tenth Circuit decision takes the position that because political parties and their candidates share common interests, it is almost nonsensical to claim that political parties can "corrupt" their members. *See Colorado Republican II*, 213 F.3d at 1231. However, because corruption goes beyond *quid pro quo* bribery and includes "the broader threat from politicians too compliant with the wishes of large contributors," *Shrink Missouri*, 120 S. Ct. at 905, it is beyond reasonable dispute that political parties can and do corrupt their members. Political parties and their LCCs are conduits for wealthy contributors who are seeking to gain access and influence over the legislative process. *See* Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 Colum. L. Rev. 620, 666 (2000). Allowing unlimited political party contributions to candidates would enhance the potential for this type of corruption.

In order to believe that political parties function as a non-corruptible source of campaign funding, one would have to believe that passing a contribution through a political party

somehow severs or weakens the link between the original donor and the ultimate candidate recipient. However, the reality is that political parties go to great lengths to ensure that this link is not severed. While it is doubtless true that some donors to political parties give large contributions for purely ideological or other selfless reasons, it is likewise clear that many large donors contribute to political parties because of the access it provides and the opportunity to attempt to win particular legislative favors. *See* Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 Am. Pol. Sci. Rev. 797 (1990); Anne Bedlington, *Loopholes & Abuses, in Money, Elections & Democracy* 69 (Margaret Nuget, John Johannes, eds., 1990); Kenneth Levit, *Campaign Finance Reform & the Returns of Buckley v. Valeo*, 103 Yale L.J. 469, 473 (1993). The parties promote these opportunities through a number of special donor clubs and programs that explicitly promise different levels of access to members of Congress depending on the amount the donor is willing to contribute. The parties do not sever the link between donors and candidates, they institutionalize the links and set up standard rates.

Moreover, the political parties themselves go to great lengths to foster the perception with the public that political contributions to the parties corrupt the institutions of government. The Republican Party regularly charges the Democrats with being in the pocket of trial lawyers and union bosses. The Democratic Party regularly charges the Republicans with being beholden to tobacco and big oil interests. Each party scrutinizes the other party's donor lists and raises highly charged questions about the opportunities for improper influence. These well publicized critiques of the political parties by their rivals are intended to convince the public, and do convince the public, that contributions to political parties can corrupt members of Congress and the parties.

The Tenth Circuit majority opinion attempts to downplay the FEC's evidence of corruption by suggesting that the problems surrounding corruption of political parties is primarily a problem of large and unlimited soft money donations. That contention is false for two reasons. First, the problems of undue influence are not limited to large soft money donations. Wealthy individuals seeking to curry favor with Congress often find it much more effective to give $15,000 to a political party or LCC than to give multiple $1,000 contributions to individual legislators. (Hickmott Decl ¶ 47). Second, the majority opinion simply ignores reality when it disregards the fact that political parties, through various methods, use soft money contributions to fund coordinated expenditures.

The political parties are currently collecting not only hard money contributions from individuals and PACS, but also large and virtually unregulated soft money contributions from individuals, corporations and labor unions. Even though soft money and hard money are, under FECA, supposed to be kept in separate accounts, and soft money is not supposed to be used for the purposes of influencing federal elections, the reality is quite different.[13] Money is a fungible

13. This Court was undoubtedly correct when, in *Colorado Republican I*, it stated that "[u]nregulated 'soft money' contributions may not be used to influence a federal campaign, except when used in the limited, party-building activities specifically designated in the statute." 518 U.S. at 616. Despite this clear statement of the law and its intent, soft money is regularly used for activities that influence federal elections, most notably through the use of sham "issue ads" that are, as a practical matter, indistinguishable from a candidate's own campaign ads. To date, the FEC has not taken enforcement action against the political parties' issue ad abuses, although at least one challenge to this inaction is currently pending in court. *See* Statement of Reasons, FEC Commissioner Scott E. Thomas, *In re The Clinton/Gore '96 Primary Committee, Inc.*, FEC Matter Under Review 4713 at n.13 (May 25, 2000), *available at* <http://www.bna.com/moneyandpolitics/clinton.htm>.

commodity, and the political parties are laundering their soft money through state party committees and creating hard money in exchange.[14]

The Democratic National Committee ("DNC") purchases hard money from its state party committees by exchanging soft money, plus a 10 to 15 percent premium. *The Washington Post* was able to use state and federal government sources to trace 12 such Democratic Party hard money/soft money swaps, ranging in size from $10,000 to $345,000, from January 1997 through April 1998. For example, in January of 1997, the Texas Democratic Party made a $150,000 hard money contribution to the DNC in exchange for a $172,500 soft money contribution. *See DNC Swaps Funds With Its State Affiliates*, Wash. Post, Apr. 24, 1998, *available at* 1998 WL 11576610. Similarly, the Democratic State Central Committee of Maryland and the Iowa Democratic Party each sent the DNC $50,000 in hard money in exchange for $55,000 in soft money. *Id.* Although the political parties clearly place a premium on hard money, the institutionalization of hard money/soft money swaps, along with the inherent fungibility of money, renders it practically difficult, if not impossible, to consider the corrupting power of hard money contributions to political parties in a conceptual vacuum that ignores the existence of soft money.

There have been several proposals before Congress to eliminate soft money. Indeed, in the last session of Congress, a majority of the members in both the Senate and the House of Representatives were on record as supporting the elimination of soft money, but the legislation was defeated through a Senate filibuster. If Congress were to eliminate

14. Thus, the Court of Appeals erred when it stated that "[t]he FEC has presented no evidence to suggest that parties have illegally utilized soft money for hard money spending." The FEC presented detailed evidence of the political parties' exchanges of soft money for hard money. (Def.'s Statement of Material Facts Not in Genuine Dispute at ¶¶ 40-49).

soft money, it might choose to raise the political party coordinated spending limits, since the danger of funneling otherwise illegal corporate, union, and large dollar contributions through the political parties would have been reduced. Alternately, Congress might retain the coordinated spending limits out of a fear that eliminating soft money could encourage those seeking influence with members of Congress into making large bundled contributions through the political parties. Elimination of coordinated spending limits could make political parties the vehicle of choice for influence seekers. If this Court takes the issue of coordinated spending by political parties "off the table" by declaring such limits unconstitutional, then Congress may have no means for eliminating any new avenues for corruption that arise after the elimination of soft money.

In sum, the Court of Appeals erred in attempting to assume away the problem of soft money when considering political party coordinated spending. Large donors to the political parties, be they large hard money or large soft money donors, create opportunities for corruption and the appearance of corruption. The courts risk creating havoc with the nation's campaign finance system when they ignore the reality of political party behavior and base their decisions on hypothetical scenarios that bear little relationship to the real world.

C. Unlimited Political Party Coordinated Spending Could Enhance the Potential for Corruption by Shifting Power to Those Members of Congress Who Control the LCCs' Spending Decisions.

A final potential avenue for corruption cited by the FEC while before the trial court was the danger that allowing unlimited coordinated expenditures could provide an opportunity for unethical party officials to use their control over the party's direct contributions and coordinated expenditures to obtain a *quid pro quo* in support of their own

personal interests, or those of their friends, such as political consultants and pollsters, or the faction of the party to which they belong. The FEC argued that eliminating the limits on coordinated party expenditures could have a corrupting effect on the LCC leaders, who are members of Congress, and on Congress itself. The potential for this type of corruption is indeed a serious one.

A popular model of the "ideal" political party — a model that has long been romanticized in the field of political science — is that political parties are unique organizations that provide links between elected officials, party organizations and citizens. *See, e.g.*, V.O. Key, Jr., *Politics, Parties, and Pressure Groups* 163-65 (5th ed. 1964); John Aldrich, *Why Parties? The Origin and Transformation of Political Parties in America* 10 (1995). This ideal party would not only provide an avenue for citizens to share their concerns with candidates and office-holders, but also would serve as a means to promulgate and promote ideology and to mobilize voters to rally round the party banner. Such a party could dilute the importance of large contributors by involving a mass base of party activists and leaders in fundraising and distribute the money to large numbers of candidates based on merit and ideology. *See* Brief Amicus Curiae Committee For Party Renewal at 7, in *Colorado Republican I, available at* 1996 WL 75770.

In the last twenty years, however, political parties have become increasingly "candidate-centered." Political parties today are characterized by: (i) a decline in volunteer activity and party work among constituents, *see* Virginia Hodgkinson, *Giving and Volunteering in the United States* (1996); (ii) a disconnect between party leaders and the rank-and-file, *see* E.J. Dionne, *Why Americans Hate Politics* 322 (1991); and (iii) the co-mingling of party leadership with leaders in government, making for "candidate-centered" rather than "party-centered" political parties, *see* Martin P. Wattenberg, *The Rise of Candidate-Centered Politics:*

Presidential Elections of the 1980s 34 (1991). The close relationship between party leaders and leaders in government makes the parties ripe for serving as knowing conduits of campaign money between large contributors and political candidates.

The era of "dilution" of the influence of large contributors through party contributions has fallen along the wayside with the myth of the ideal party. In terms of either large soft money contributions or large hard money contributions, party leaders are artful at connecting the contributor with the appropriate beneficiary. As we have seen, this connection can be as simple as coffees with the President in the White House Map Room or golf outings with the House Speaker in Palm Beach. Or the connection can be more business oriented, such as the "cash-for-access confabs on pending bills" arranged through the appreciative party leadership. *See* Phil Kuntz, *Cash-for-Access Policy Forums on Bills Are Common, Controversial in Senate*, Wall Street J., Jan. 25, 2000, at 16.

While executive officials also work in an intimate and undiluted relationship with party leadership, much attention lately has been focused on the reciprocal relationship between party and congressional leaders. One of these avenues for an undiluted connection between large contributors and congressional leaders is the LCC.

Over the last 20 years, the LCCs and their leaders have become important institutional players in Congress and frequently are comprised of congressional leaders themselves. *Compare* Robin Kolodny, *Pursuing Majorities: Congressional Campaign Committees in American Politics* 122-55 (1998), *with* Paul Herrnson, *Party Campaigning in the 1980s* 30-83 (1988). The increasing emphasis within the LCCs on money and fund-raising exacerbates the danger that these committees have become little more than financial conduits for the candidates and an important means for large

contributors to secure access to targeted candidates and officials. LCCs have virtually no ties to the grassroots constituency of the party; rather they exist solely to serve the party leaders and elected congressional members. If one values political parties for their ability to mobilize large groups of voters in a grassroots sense, allowing LCCs to become more dominant players in federal campaigns does not serve to strengthen political parties. Indeed, the greatest danger is not just that LCCs connect large contributors with federal candidates, but that they connect large contributors with congressional leaders. LCCs place large contributors in intimate contact with those who direct the legislative process. *See* Richard Briffault, *The Political Parties and Campaign Finance Reform*, *supra* at 651; Frank J. Sorauf, *What Buckley Wrought?*, *in If Buckley Fell: A First Amendment Blueprint for Regulating Money in Politics*, 11, 31 (E. Joshua Rosenkranz ed., 1999).

Moreover, as LCCs become increasingly important in dispensing money to federal candidates, the members of Congress who have leadership positions within the LCC are gaining increasing power within the institution, which is a potential source of corruption. Of course, it is inevitable in any legislative body that some group of legislators will rise to positions of power and influence within the body. But it is not inevitable that legislators will rise to prominence by virtue of their fundraising prowess, rather than their legislative abilities and success. Although Congress is certainly entitled to choose to reward its members for their fundraising success, it is also entitled to guard itself against the danger that its chief fundraisers will become too powerful *vis-à-vis* other members.

Just as many in society view it as corrupt when the legislative agenda is set by those who have made large contributions, Congress could reasonably view it as corrupting of the institution when raising money, rather than legislative success, becomes a principal means for

advancement in Congress. In recent years, raising funds for and through the LCCs has become a principal means of advancement up the party ranks. By limiting the amount that LCCs can spend in coordination with any given candidate, Congress has put at least some institutional limit on importance of fundraising and the power of its own fundraisers.[15]

Some have argued that allowing unlimited coordinated spending would lead to stronger political parties because LCCs would be able to discipline their members and enforce candidate adherence to the party's goals and platforms. However, there is virtually no political science evidence that would support this conclusion. *See* Robert Boardwright, *"You Don't Know Me, But Here I Am," Congressional Candidates, & Party Strength, in The State of the Parties: The Changing Role of Contemporary American Parties* 320-23 (John Green & Dan Shea, eds., 1999); Dan Shea, *Transforming Democracy: Legislative Campaign Committees and Political Parties* 29 (1995). As a general rule, LCCs do not support candidates based on their fidelity to the party's program or

15. When the House of Representatives in 1920 decided that Speaker Joseph G. Cannon was becoming too powerful *vis-à-vis* his fellow Congressmen, the House stripped the Speaker of the power to appoint committee chairs and reverted to the seniority system. Similarly, in the 1970s, when the House was unhappy with the power exercised by individual committee chairs, it abolished the formal seniority system and made committee chairs and ranking minority positions subject to election by secret ballot in the party caucuses. Congress has always been able to take self-protective measures that were intended to prevent its own members from becoming too powerful, which increases the risk of corruption. By limiting the ability of LCCs to spend unlimited sums, Congress has essentially required the LCCs to spread their monetary resources more broadly. In so doing, it has reduced the power of the LCC leaders by reducing their power to dominate individual members' races with their spending decisions. As with instituting or ending the seniority system for committee chairs, this is a policy choice that Congress is uniquely qualified to make.

platform. Rather, LCCs support candidates almost exclusively for the purposes of winning or maintaining seats. *See* Paul S. Herrnson, *Congressional Elections: Campaigning at Home and In Washington*, 90-100, 115-19 (3d ed. 2000); Jeffrey M. Stonecash & Sara F. Keith, *Maintaining a Political Party: Providing and Withdrawing Party Campaign Funds*, 2:3 Party Politics 313-28 (1996); Frank J. Sorauf & Scott A. Wilson, *Campaigns and Money: A Changing Role for the Political Parties? in The Parties Respond: Changes in the American Party System* 187-203 (L. Sandy Maisel, ed. 1990).

Additionally, there is some anecdotal evidence that individual LCC leaders have used their control of the pursestrings, in the words of Chief Judge Seymour in dissent, to "further[ ] their pet interests, thereby corrupting or appearing to corrupt the legislative process." 213 F.3d at 1243. For example, it was widely-reported in 1998 that the Chairman of the National Republican Senatorial Committee refused to fund his party's candidate in the Washington Senate race because she was a vocal advocate of campaign finance reform and publicly called the Chairman a "money launderer." *See* Nightline Transcript (ABC television broadcast, Nov. 2, 1998) ("Senator Mitch McConnell . . . controlled the Republicans' national campaign kitty and used it to reward and punish candidates."), *available in* 1998 WL 5373168; *GOP Launches Aerial Attack; Democrats Struggle Against Torrent of Money*, Wash. Post, Oct. 18, 1998, *available in* 1998 WL 16563078; *Winners & Losers Sorting Through the Rubble of an Election Day Explosion*, U.S. News & World Rep., Nov. 16, 1998, *available in* 1998 WL 8127587; *State GOP "Outraged" by Cash Snub*, Seattle Post-Intelligencer, Oct. 15, 1998, *available in* 1998 WL 4308445.

When individual members of Congress become increasingly powerful within the institution, not by virtue of their legislative abilities and achievements, but instead

because of their control of the campaign spending decisions of the political parties, there is a potential for a corruption of the democratic processes. Individual members of Congress may become afraid to buck the pet interests of individual party leaders, even when the party itself lacks a firm position on the issue. *See generally* Richard Clucas, *Party Contributions and the Influence of Campaign Committee Chairs on Roll-Call Voting*, XXIII Legis. Stud. Q. 174-94 (1997). While incidents of leadership abuse of their spending power have been relatively rare to date, that situation might well change if coordinated party spending limits are removed. As one experienced Democratic fundraiser testified in the trial court below, "[t]aking away the limits on coordinated expenditures would result in a fundamental transferal of power to certain individual Senators." (Billings Decl. ¶ 19). Surely the Congress has the power to limit the ability of LCCs and their chairs from becoming all-powerful money brokers.

CONCLUSION

The Constitution is silent on the role of political parties in our government structure. We believe that Congress, and not the Courts, has the expertise necessary to make the ultimate determination concerning whether unlimited political party coordinated spending may lead to corruption of our governmental institutions. We agree with Chief Judge Seymour, who noted in dissent, that "it is difficult to credit the bald assertion" of the Court of Appeals that the politicians who passed the Federal Election Campaign Act "gravely misunderstood" the role political parties play in American politics. The legislative determination made by Congress, to grant political parties a preferred status in our campaign funding scheme, but not to grant them unlimited power to make contributions to candidates, is a policy judgment that Congress is uniquely qualified to make. It is likewise a policy judgment that, if left undisturbed by the Court, Congress may itself choose to revise in the future. After all, this is a limitation that members of Congress have imposed on themselves. Intervention by the Court is both unwise and unnecessary.

Respectfully submitted,

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